No. 83-573

In the Supreme Court of the United States

October Term, 1983

MARTIN DANZIGER, et al.,
Appellants,

vs.

HOTEL & RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF ATLANTIC CITY CASINO HOTEL ASSOCIATION AND PLAYBOY HOTEL CASINO AS AMICI CURIAE IN SUPPORT OF APPELLANTS

WILLIAM F. KASPERS
(Counsel of Record)
R. MASON BARGE
3500 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9200
Counsel for Amici Curiae Atlantic City Casino Hotel Association and Playboy Hotel Casino

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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The Atlantic City Casino Hotel Association and Playboy Hotel Casino hereby respectfully move for leave to file the attached brief *amici curiae* in support of Appellants. The consent of the attorneys for the Appellants was requested; the Appellants neither consent nor object to the filing of the attached brief. The consent of the attorney for the Appellees was requested but refused.

The Atlantic City Casino Hotel Association currently has eight members—eight of the nine casino hotels in Atlantic City. Its members are Bally's Park Place Casino Hotel, Caesars Boardwalk Regency Hotel Casino, The Claridge Hotel And Casino, Golden Nugget Hotel Casino, Harrah's Marina Hotel Casino, Resorts International Casino Hotel, The Sands Hotel & Casino, and Tropicana Hotel & Casino.

The Playboy Hotel Casino, the ninth hotel casino in Atlantic City, is not currently a member of the Association for reasons totally unrelated to this case.

The interest of the Association and Playboy Hotel Casino in this case arises from the fact that the Association's members and Playboy Hotel Casino are subject to the same federal and state statutes, regulations, and procedures as the Appellees. More specifically, the officers, agents, and employees of each Atlantic City casino hotel are subject to the licensing, registration, and disqualification provisions of New Jersey's Casino Control Act, N.J. Stat. Ann. §§ 5:12-1, *et seq.* (West Supp. 1981), and are subject to the enforcement procedures of the Appellants in the same manner and at least to the same extent as the Appellees. The Association and Playboy Hotel Casino thus have a vested interest in the outcome of this case.

While each Atlantic City casino hotel does not always agree with the manner in which the Appellants apply the Casino Control Act,[1] the Association, its members and Playboy Hotel Casino support the state statute and its underlying purpose—to protect the people of New Jersey and the employers, employees, bargaining representatives, and patrons of the Atlantic City casino gambling industry from infiltration by criminals and organized crime.

Because Appellants are not charged by statute with the responsibility for regulating the day-to-day labor-management relations within the Atlantic City casino gambling industry, they do not possess the same knowledge of the facts and history of labor-management relations in said industry as the Atlantic City casino hotels. For example, the Appellants may not know, but the casino hotels obviously do know, that Local 54 has never been certified

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1. See, e.g., *Bally Manufacturing Corp. v. Casino Control Commission*, 534 F.Supp. 1213 (D.N.J. 1982).

by the NLRB as the exclusive bargaining representative of any employees of any casino hotel in Atlantic City. Local 54 has instead obtained its representational status through voluntary recognition by each of the casino hotels in Atlantic City. While the difference between NLRB certification and voluntary recognition may not be critical to the disposition of this case, the Third Circuit repeatedly referred to the Union as the "certified" bargaining representative of certain employees in the Atlantic City casino industry. 709 F.2d at 817, 825, 830, 831 and 832. The casino hotels' factual knowledge may, therefore, be helpful to this Court in correcting factual errors in the decision below.

Because the Appellants, as state agencies, are expressly excluded from the coverage of the NLRA, as amended, by the provisions of Section 2(2) of the Act, 29 U.S.C. § 152(2), they do not possess the same experience or knowledge of federal labor law as the Atlantic City casino hotels, who are covered by the NLRA.

It is, therefore, submitted that the brief which *amici curiae* are requesting permission to file contains both factual and legal arguments which Appellants are not in a position to make. If the arguments are accepted, they would be dispositive of the pre-emption issue.

Respectfully submitted,

WILLIAM F. KASPERS
(Counsel of Record)
R. MASON BARGE
3500 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9200

Counsel for Amici Curiae Atlantic City Casino Hotel Association and Playboy Hotel Casino

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BRIEF OF ATLANTIC CITY CASINO HOTEL ASSOCIATION AND PLAYBOY HOTEL CASINO AS AMICI CURIAE IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST

The Atlantic City Casino Hotel Association currently has eight members—eight of the nine casino hotels in Atlantic City. Its members are Bally's Park Place Casino Hotel, Caesars Boardwalk Regency Hotel Casino. The Claridge Hotel And Casino, Golden Nugget Hotel Casino, Harrah's Marina Hotel Casino, Resorts International Casino Hotel, The Sands Hotel & Casino, and Tropicana Hotel & Casino.

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SUMMARY OF ARGUMENT

The principal argument of this Brief is that the New Jersey statute and procedures under examination are not pre-empted whatsoever by federal law. Insofar as the direct area of concern—the disqualification of persons from

serving as union officials because of their prior criminal activities—was ever thought to be within the NLRB's jurisdiction under Sections 1 and 7[1] of the NLRA, Congressional passage of the LMRDA removed jurisdiction from the NLRB and gave it to the federal courts. In other words, the LMRDA stands as a Congressional statement that Section 7 does not, and was never intended to, prevent federal courts from disqualifying union officials in certain circumstances.

It is thus the LMRDA, not the NLRA, which represents Congress' exercise of jurisdiction in the subject area here in issue. Both the express terms of the LMRDA and its legislative history, however, prove that Congress had no intention of pre-empting the field, but instead fully intended that the states be left free to exercise their police power to prevent criminal infiltration of organized labor.

ARGUMENT

POINT ONE

THE LMRDA DOES NOT PRE-EMPT THE NEW JERSEY CASINO CONTROL ACT

By express provision, the LMRDA does not and was not meant to pre-empt similar state legislation. Section 603(a) of the LMRDA, 29 U.S.C. § 523(a), states:

> Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . under the laws of any state . . . .

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1. To the extent that the "freedom of association" guaranteed in Section 1 of the NLRA is incorporated in the right to choose a collective bargaining representative provided in Section 7 of the Act, this Brief, for purposes of brevity, shall hereafter refer simply to Section 7.

The Third Circuit's characterization of this section as "a savings clause [limited to] preserving state law remedies for breach of fiduciary duties," 709 F.2d at 827, is entirely without justification or support. The savings clause applies to the entirety of the LMRDA.

In the first place, Section 603 applies, by its own explicit terms, to "this chapter," not to "this subchapter." "This chapter" is by definition the entirety of the Act, and is so defined throughout. For example, the separability provision, 29 U.S.C. § 531, uses the term "this chapter" and clearly intends application to the entirety of the Act. *See also* 29 U.S.C. § 525. In 29 U.S.C. § 521, the statute enables the Secretary of Labor to take action to remedy "any provision of this chapter (except subchapter II of this chapter)."

When Congress intended to limit a provision to a part of the Act, it so specified by using the term "subchapter," *e.g.* 29 U.S.C. § 483, or by using a specific section number, *e.g.* 29 U.S.C. § 482(a). The annotation to Section 603 itself states that

> 'This chapter,' referred to in subsections (a) and (b), was in the original 'this Act,' meaning Pub.L. 86-257 which added this chapter . . . .

29 U.S.C.A. § 523, Historical Note, "References in Text." The use of the word "chapter" in the savings clause thus clearly indicates that the entirety of the LMRDA, not just one subchapter or section, is not pre-emptive of similar state legislation.

Thus, by the express terms of the statute, the savings clause (Section 603) applies to the entirety of the LMRDA (Title 29, Chapter 11, enacted as Pub.L. 86-257) in general, and to 29 U.S.C. § 504 (Pub.L. 86-257, Title V, § 504) in particular. The Third Circuit's assertion that "there is

no equivalent savings provision in section 504," 709 F.2d at 828, is simply wrong.[2]

The legislative history of the LMRDA is similarly unequivocal. The Senate discussed the problem that the Act might be construed as pre-emptive and designed Section 603 specifically to prevent such an interpretation, over the objection of at least one senator who argued that the LMRDA *should* be pre-emptive.

Debating the very first provision of the bill, Senator Kennedy raised the question of whether such protection could best be secured by the LMRDA, the NLRA, or by state laws. He explained that the question needed to be raised

> because I think the amendment raises the question of pre-emption. In other words, if the proposal were enacted, the present rather exhaustive remedies provided under the common law of the various states might be wiped out . . . .

Legislative History of the LMRDA of 1959, p. 255 (no publisher or date; U.S. Doc. Ref. L21.5: L 11/2). Senator Kennedy went on to state that the body of state law to which he referred went beyond the criminal law provisions; he saw a need to protect state laws from federal pre-emption beyond the protection provided in 29 U.S.C. § 524. *Id.* at 256.

Section 603(a) was thus added. In the words of Congressman Dent, it was "designed to encourage states to enact state legislation imposing additional restrictions on labor unions' conduct of their own internal affairs . . . ." *Id.* at 1127. In other words, the LMRDA was not only intended to preserve state legislation such as the New Jer-

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2. Section 504 is in the same Title and subchapter as the fiduciary responsibility sections—i.e., Sections 501-503—anyway. The Third Circuit's reasoning and conclusion are simply unfathomable.

sey Casino Control Act, but also to promote the passage of such legislation.

Perhaps the strongest statement of a legislator, however, is a statement by Senator Morse as to why Section 603(a) should *not* be adopted:

> This is a 'States Rights' provision which flies in the face of traditional concepts in the field of national labor relations policy and law and has no place in legislation which is designed to remedy, through Federal law, deficiencies in State law enforcement which have been largely responsible for allowing crooks and racketeers to work their way into the labor and management fields.
>
> In fact, Mr. President, in regard to the so-called States' rights argument, it should be said that the States have a great deal to answer for because of the fact that they have not enforced their own criminal laws against the racketeers and the crooks. They have been inclined to 'pass the buck' to the Federal Government. They want it both ways.

Id. at 1135.

In short, the arguments presented by Local 54 and accepted by the Third Circuit in favor of the LMRDA's preemptive effect have already been made to and rejected by the Congress at the time the LMRDA was enacted. Congress' intent was clear; Section 603(a) was added to preserve the states' rights to regulate internal union affairs, in order to prevent racketeering. It was added precisely to preserve a state's right to pass the sort of legislation now before the Court, and reconsideration of the issue, in the face of clear Congressional intent, is inappropriate.

Furthermore, this Court has already held that the LMRDA is not pre-emptive. *DeVeau v. Braisted*, 363 U.S. 144 (1960), is controlling authority on this point and should

have been followed by the Third Circuit. Trying to show that *DeVeau* means something other than what it says—i.e., that the LMRDA does not pre-empt the type of state legislation here presented—the Circuit stated as follows:

> Frankfurter's opinion did not command a majority . . . . Justice Brennan, whose separate brief opinion was critical for the judgment, made it clear that he relied on Congressional intent in approving the compact.

709 F.2d at 829. In fact, Justice Brennan's concurring opinion reads as follows:

> Mr. Justice Brennan is of the opinion that Congress has demonstrated its intent that Section 8 of the New York Waterfront Commission Act should stand despite the provisions of the National Labor Relations Act, and *that the Labor Management Reporting and Disclosure Act of 1959 explicitly provides it shall not displace such legislation of the States.*

363 U.S. at 160-61 (emphasis added).

One must wonder whether this is the same opinion read by the Third Circuit. In plain and unambiguous English, Mr. Justice Brennan, like four other members of the Court,[3] affirmed the lower court on two grounds, one of which was that the LMRDA explicitly does not pre-empt this sort of state legislation.

In conclusion, every factor to which this Court looks in construing a statute shows that the LMRDA does not pre-empt the New Jersey statute: the LMRDA explicitly and unambiguously states that it is not pre-emptive; the

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3. The Circuit's statement that Justice Brennan's opinion "was critical for the judgment" is similarly inaccurate. Only eight Justices heard the appeal. Even if Justice Brennan had joined the dissent, the lower court's opinion would have been affirmed by an equally divided Court, i.e., the judgment would have been the same. The importance of his opinion is that, insofar as it agrees with that of Justice Frankfurter, it creates binding precedent which the Third Circuit has ignored.

legislative history shows that Congress included Section 603(a) specifically to preserve and promote overlapping state legislation; and this Court has held, in a consensus majority opinion, that the LMRDA does not pre-empt a roughly identical state statute.

POINT TWO

THE NLRA DOES NOT PRE-EMPT THE NEW JERSEY CASINO CONTROL ACT

Answering the question of whether the LMRDA pre-empts the instant state exercise of police power also answers, by implication, the question of whether the NLRA pre-empts it. Essentially, applying Congress' intent in passing the NLRA to this case boils down to one question: In passing Section 7, did Congress intend to include in employees' "freedom of choice" the right to choose convicted felons as their collective bargaining representatives, especially in industries highly susceptible to criminal infiltration?

With no more guidance than the statute itself and a legislative history void of comment, the question would be a debatable one. One would have to balance the theoretical lack of qualification on employee freedom, implied by a literal reading of the statute itself, against the practical absurdity of encouraging labor racketeering in an industry fertile for such abuse.

It is no longer necessary, however, to consider this question in the abstract. When Congress enacted Section 504 of the LMRDA, it proved three points.

First, the passage of the LMRDA shows that Congress considered such legislation to be necessary. By implication, Congress recognized that unlimited employee freedom is not the aim of Section 7.[4] Specifically, some control

4. See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945).

must be placed on the kinds of persons authorized to act as employee representatives in order to prevent labor unions from becoming federally-sponsored labor rackets. Even if one could have reasonably argued, in 1945,[5] that Congress intended employee freedoms to extend to the selection of convicted felons as their collective bargaining representatives, the argument became untenable upon passage of the LMRDA in 1959. Congress clearly recognized that Section 7 freedoms are properly restricted by legislation disqualifying a certain class of persons—persons who, by an objective standard, are likely to misuse the influence of organized crime in labor unions—from serving as union officials.[6]

Second, passage of the LMRDA shows that Congress had never considered the prevention of criminal infiltration in labor unions to be a purely federal question. The LMRDA was passed *not* because Congress felt it necessary to exercise pre-emptive or exclusive federal jurisdiction in the area, but rather because it needed to exercise concurrent jurisdiction in an area where state regulation was inadequate. The LMRDA was adopted in large part because state and local authorities had failed to adopt "effective measures to stamp out crime and corruption [in unions] and guarantee internal union democracy . . . ." *Longshoremen v. Waterfront Commission,* 495 F.Supp. 1101, 1123 (S.D.N.Y., 1980), *quoting* Sen. Rep. No. 187, 86th Cong., 1st Sess., April 14, 1959, p. 6.

If Congress passed the LMRDA to remedy the states' failure to pass similar laws, it must have considered, *a fortiori,* that the states were empowered to pass such

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5. When *Hill v. Florida,* 325 U.S. 538 (1945), was decided.

6. As Justice Frankfurter very eloquently stated, "Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however, dialectically plausible, of that policy?" *DeVeau v. Braisted, supra,* at 153.

laws. Both the passage of the LMRDA and the legislative history underlying it are positive proof that Congress does not consider its jurisdiction in the area exclusive and does not believe that Section 7 of the NLRA pre-empts state jurisdiction to control criminal infiltration of labor organizations.

As this Court noted in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 771 (1947),

> Congress [in passing the NLRA] has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulations either shall or shall not exclude state jurisdiction.

The LMRDA has provided, however, the guidance absent when the NLRA was passed.

The manner of enforcement Congress chose for the LMRDA also sheds light on the pre-emptive effect of Section 7. The National Labor Relations Board is charged with enforcement of Section 7; if Section 7 pre-empts disqualification of union officials for criminal conduct, then such disqualification must come under the Board's jurisdiction. This is true even if the Board has decided that no such regulation is appropriate or approved under the policy of the NLRA. *Id.* at 774.

In other words, it is the NLRB which is charged with enforcement of Section 7, and if Section 7 was truly intended to extend the absurd degree of "freedom of choice" here argued by Local 54, the Board would have been given the sole power to safeguard that freedom. If Congress wished to modify Section 7, then, it would make the modification under the Board's jurisdiction, by instructing the Board not to certify persons convicted of felonies or labor organizations employing them.

But enforcement of Section 504 was not given to the Board. Instead, it was placed in the courts, and the courts

were given exactly the power to do what this Court forbade the State of Florida to do in *Hill v. Florida, supra*: that is, to interfere if necessary, with the Board's collective bargaining process in order to prevent labor racketeering. Certainly, a federal district court's jurisdiction under Section 504 preempts the Board's jurisdiction to certify a collective bargaining representative. Where Section 7 and Section 504 come into conflict, Section 504 must and does prevail because the courts, and not the Board, have preemptive jurisdiction in the area of disqualifying union officials for criminal conduct.[7]

By its action in passing the LMRDA, Congress has, in effect, stated that this area is outside the Board's jurisdiction. If state regulation in this area is pre-empted, it is not by Section 7, but by Section 504.

In other words, Congress has passed two distinct statutes, the NLRA and the LMRDA. If one of them pre-empts state action, it must be Section 504 of the LMRDA, because Section 504, not Section 7, is the statute passed on the same subject area. In 1945, it was necessary to speculate on whether state regulations of union officials' qualifications conflicted with Section 7, because there was a possibility that Congress had intended Section 7 as a comprehensive exercise of its power to prescribe the qualifications of labor representatives. Since the passage of the LMRDA, however, such speculation is inappropriate. Congress clearly intended Section 7 to cover certification questions not involving the prior criminal convictions of union officers, an area reserved to the courts and finally exercised, by passage of Section 504, in 1959.

This principle of statutory construction has previously been considered and approved by the Court. In *DeCanas*

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7. The Board itself considers that matters treated in the LMRDA are outside its statutory competence. Its decision in *Alto Plastics*, 136 N.L.R.B. 850 (1962), where it certified a union controlled by a known labor racketeer, is extremely instructive on this issue.

v. Bica, 424 U.S. 351 (1976), migrant farmworkers sued their former employers under a provision of the California Code which forbade employment of certain illegal aliens. The state court invalidated the statute, partly on the grounds that it was pre-empted by the Immigration and Naturalization Act. This Court reversed, finding the state statute not pre-empted by the INA.

As part of its rationale, the Court looked to Congress' passage of the Farm Labor Contractor Registration Act, which forbade farm contractors from employing illegal aliens. The Registration Act was both more recent in enactment than the INA and more specific in its coverage of the conduct involved. The farmworkers urged that Congress' passage of the Registration Act showed that Congress had "unmistakably . . . ordained exclusivity of federal regulations in the field." *Id.* at 361. The Registration Act also contained, however, language that showed it was not intended to pre-empt state legislation in the area.

This Court inferred from the Registration Act's non-preemption language that not only the Registration Act, but also the INA, was not pre-emptive.[8] The Court considered the Registration Act to be "persuasive evidence that the INA should not be taken as legislation by Congress expressing its judgment to have uniform federal regulations in matters afffecting employment of illegal aliens, and therefore barring state legislation . . .", also calling it "affirmative evidence . . . that Congress sanctioned concurrent state legislation on the subject." *Id.* at 362, 363.

This analysis in *DeCanas* is precisely the analysis that should be applied to the NLRA and LMRDA. Where

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8. There were additional grounds for this holding, most notably a lack of federal exclusivity within the INA itself (unlike the NLRA). The case is not cited, however, for substantive precedent, but for the analysis used to determine Congressional intent when a later, more specific federal statute is passed.

Congress passes a broad and somewhat vague statute that seems to pre-empt a certain area of state legislation—such as the INA or NLRA—but later passes a specific statute that explicitly does *not* pre-empt that area of state legislation—such as the Registration Act or Section 504 of the LMRDA—the correct inference to be drawn is that Congress intended neither of its statutes to be pre-emptive in the area.

The LMRDA was not Congress' last pronouncement on this subject. Congress' enactment of Title IX of the Organized Crime Control Act of 1970, Pub.L. 91-452, 84 Stat. 941, and of Chapter 96 to Title 18 of the United States Code, 18 U.S.C. §§ 1961-1968 (Racketeer Influenced and Corrupt Organization or "RICO"), further confirms that neither the LMRDA nor the NLRA was intended by Congress to pre-empt the type of state legislation at issue here. RICO defines "enterprise" to include "any union," 18 U.S.C. § 1961(4), and gives the federal courts the power to order any person "employed by or associated with any" racketeering enterprise, 18 U.S.C. § 1962(c), "to divest himself of any interest, direct or indirect", in said enterprise. 18 U.S.C. § 1964(a). In Section 904(b) of Pub.L. 91-452, Congress expressly provided that:

> Nothing in this title shall supersede any provision of Federal, state, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

As this Court noted in *United States v. Turkette,* 452 U.S. 576 (1981) (a criminal case):

> RICO imposes no restrictions upon the criminal justice systems of the states. . . . Thus, under RICO, the states remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute predicate

> acts of racketeering under RICO, is no restriction on the separate administration of criminal justice by the States.

Id. at 586 n. 9.

Thus, just like the LMRDA, RICO clearly proves that preventing criminals—and in the case of RICO, persons associated with criminals—from involvement with labor organizations is an area not pre-empted by Section 7; that insofar as there is a conflict between the NLRA and laws dealing with the removal of criminal elements from labor unions, the latter must control; and that the states are permitted, and even encouraged, to develop legislation in the area.

POINT THREE

THIS COURT'S PRECEDENT CONFIRMS THAT THE NEW JERSEY STATUTE IS PROPER

A. The Principal Cases

Although this Court has decided numerous cases involving pre-emption of state law by federal labor legislation, only two decisions are close enough to the facts of this case to be considered controlling: *Hill v. Florida*, 325 U.S. 538 (1945), and *DeVeau v. Braisted*, 363 U.S. 144 (1960). A comparison of the facts, holdings and circumstances of these two cases shows that *DeVeau* should be applied to the present facts, and New Jersey should be permitted to enforce its Casino Control Act.

In *Hill v. Florida*, the State had passed a statute generally regulating labor unions and their agents. It required, inter alia, that labor unions doing business in the state obtain a license, pay a $1.00 fee, and file an annual report. It also required a license and $1.00 of all union agents, and stipulated that they be of good moral character, free of any felony convictions, and citizens for

at least ten years in order to qualify for the license. Violation of the statute was a misdemeanor.

The petitioner union and its business agent, Mr. Hill, were enjoined from functioning as such until they had obtained the requisite licenses. This Court struck down the injunctions and declared that the statute had been applied in a manner which infringed upon the NLRA so substantially as to violate the Supremacy Clause.

In the instant case, the Third Circuit relied on *Hill* as standing for the proposition that Section 7 precludes a state from passing any law which might disqualify a labor union or union agent from functioning as a bargaining agent. This analysis is not sound, for two principal reasons: the facts of *Hill v. Florida* are critically different from the facts here considered, and subsequent developments—the passage of the LMRDA and the decision in *DeVeau*—have limited the scope of *Hill's* applicability.

B. The Present Case Is Distinguishable From Hill v. Florida

The Florida statute overturned in *Hill* was an out-and-out attempt by the state to regulate labor unions and their officials in every business in the state. Its sole purpose was to license unions and their agents, and to prescribe qualifications for the license.

The New Jersey statute here considered is not a statute designed to regulate unions and their agents. It is instead a statute designed to regulate a single industry—casino gambling—over which states have historically exercised primary control, and only in one location—Atlantic City. The impact on Section 7 rights is purely a derivative effect of a proper exercise of the state's police power, a power exercised to prevent the infiltration of criminals and organized crime into the Atlantic City gaming industry. The possible impact on Section 7 rights is, fur-

thermore, limited to a narrow part of the employment spectrum, those employees whose labor representatives are in a position to put pressure on gaming employers. Similarly, the state regulations themselves are narrow; they do not seek to regulate employment relations, but merely to take reasonable measures to prevent possible takeovers by crime syndicates. The degree of impact on labor-management relations is minimal and is incidental to the Act's purpose.

In *Hill*, the police power exercised by Florida was the power to regulate employment relations, and the statute was correspondingly broad. By and large, cases which have prevented states from intruding into matters covered by the NLRA have similarly been cases in which the states have attempted to regulate labor relations in a manner which directly conflicts with the NLRB's jurisdiction. *E.g., Hill v. Florida; Bethlehem Steel Co. v. NLRB*, 330 U.S. 767 (1947); *Street Coach Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951); *U.A.W. v. O'Brien*, 339 U.S. 454 (1950).[9] The police power exercised by New Jersey, on the other hand, is the power to prevent its fledgling casino gambling industry from the inevitable efforts of organized crime to infiltrate it, and the statute is correspondingly tailored.

In cases where an otherwise valid exercise of a state's police power has existed—that is, where the purpose of the legislation has not conflicted with pre-emptive federal legislation—this Court has been willing to balance some impact on the NLRA with the states' need to protect the

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9. In fact, since *Hill*, this Court has summarily reversed several cases in which a state court purported to regulate labor union activities under state laws which, like *Hill*, had as their underlying purpose the regulation of labor relations in direct conflict with the primary jurisdiction of the NLRB. *E.g., Pocatello Bldg. & Constr. Trades Council v. C.H. Elle Constr. Co.*, 352 U.S. 884 (1956); *Electrical Workers v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957).

citizenry. In *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), for example, the Court allowed the State to enjoin union conduct such as mass picketing, threats of violence, and the picketing of residences. There the Court stated that it would "not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States" in an area involving traditionally local matters. *Id.* at 749. Certainly, the regulation of gambling is almost exclusively a matter of state law; and the New Jersey statute, as applied in this case, has less impact on labor-management relations than do state court strike injunctions.

Similarly, in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), the Court allowed a state court to enjoin labor picketing which constituted a violation of state trespass laws. *See also, e.g., Farmer v. Carpenters*, 430 U.S. 290 (1977); *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966); *U.A.W. v. Russell*, 356 U.S. 634 (1958).[10]

This is not to say that the Court may not strike down laws of general applicability when aspects of the challenged law conflict with federal labor policy. Rather, it is to show that *Hill v. Florida* was in a class of cases almost certain to be struck down, a class to which the present case does not belong.

C. The Intervention of DeVeau and Passage of the LMRDA

1. The Holding in DeVeau

Even assuming that *Hill*, at the time it was decided in 1945, would have been controlling precedent in the present

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10. Cf. *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 533 (1979) ("the general purport of the program is not to regulate the bargaining relationships between the two classes but instead to provide an efficient means of ensuring employment security in the state").

case, the subsequent decision in *DeVeau v. Braisted*, 363 U.S. 144 (1960), and its acknowledgement of changes wrought in this area by the passage of the LMRDA, require that *Hill* be substantially limited to circumstances not present here.

DeVeau arose from the passage of New York's Waterfront Commission Act, which comprised three parts: Part I established a bi-state agency in connection with similar legislation in New Jersey, an action which constituted an agreement or "compact" between the states requiring Congressional approval under the Constitution; Parts II and III, not part of the compact requiring Congressional approval, included a provision, quite similar to the New Jersey statute at issue here, prohibiting a labor organization from collecting dues from waterfront employees if any of its officers or agents had ever been convicted of a felony.

In affirming New York's right to enforce the statute, the Court followed two lines of analysis. The first dealt with whether Congress intended to pre-empt such legislation. The Court held, with sound reason, that the issue of pre-emption had been brought to Congress' attention even though it was not *per se* part of the interstate compact approved. If Congress had intended that this kind of legislation be proscribed by federal law, it would likely have manifested its intentions in adjudicating the compact. The second dealt with the merits of whether federal labor laws could be said to pre-empt the Waterfront Act.

In the opinion below, the Third Circuit seized on the first line of analysis to distinguish *DeVeau* from the present case. Because *DeVeau* involved state legislation approved by Congress, the court reasoned, it applies only to cases where Congress has expressly approved the state legislation at issue. This attempt to distinguish *DeVeau* is faulty for two reasons. First, the Third Circuit misunderstood and thus misapplied Congress' action in approving the in-

terstate compact. Congress' approval constituted a general statement on its intention that the states be allowed to pass laws such as the Waterfront Act, as well as a specific approval of the Waterfront Act. As such, it supports the State's position as much as the Union's. Second, the *DeVeau* Court did not depend solely upon Congress' approval of the compact for its decision; it also relied upon the merits of the pre-emption issue, an analysis equally applicable to the present case.

2. Congress' Approval of the Compact in DeVeau Was of General Significance and Should Be Extended to This Case

The Third Circuit read Congress' approval of the interstate compact in *DeVeau* as nothing more than a distinguishing feature of the case which rendered *DeVeau* inapplicable to any case where express Congressional approval has not been given to a State regulatory scheme. Such an interpretation is not only incorrect, but also ignores the general Congressional support of such legislation manifested by Congress' action.

Assuming that Congress' approval of the compact did, in fact, include tacit approval of the New York regulatory scheme,[11] one must ask why Congress would approve such a scheme if it had intended federal labor law to pre-empt such legislation. Are the NLRA and LMRDA so well-crafted that there is no need for states to pass legislation preventing criminal infiltration of sensitive industries through control of labor unions? Obviously not; Congress' assumed approval of the concurrent state legislation is a clear indication that Congress believed in the need for legislation such as the New York Waterfront Commission Act.

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11. Of course, if this assumption is not made, *DeVeau* is indistinguishable from the present case and the Third Circuit should be reversed summarily.

Is it improper, then, as the means to prevent such infiltration, for a state to disqualify persons convicted of felonies from serving as labor officials, even if they are eligible under Section 504 of the LMRDA? Once again, the answer is no. Congress, by approving the compact and thereby tacitly favoring Section 8 of the New York Act, indicated that such a state law is a proper means for a state to accomplish a proper end.

Is it Congress' position, then, that such laws are acceptable only if submitted to and ratified by Congress prior to their implementation? Certainly not; such a position is entirely unsupported by any authority and approaches the realm of absurdity.

The only reason Congress was even able to consider the Waterfront Act was that it involved a compact between two states. Such a compact can only be made with the consent of Congress, under the prohibition of Article I, Section 10 of the Constitution. *E.g., Virginia v. Tennessee*, 148 U.S. 503 (1893). Congress does not routinely render opinions on the validity of state legislation. It has neither the time, the procedures, nor perhaps the Constitutional power to decide such questions.

Insofar as Congress indicated approval of the Waterfront Act, it was not an attempt to usurp the courts' function and pass on a specific piece of state legislation. The specific legislation was not even before it. Rather, Congress' lack of concern with Parts II and III of the Waterfront Act must be interpreted as reflecting its general endorsement of a state's right to pass such legislation, where the legislation is narrowly drawn, interferes as little as reasonably possible with federal labor relations policy, and is necessitated by a genuine need for the legislation at the state level.

In other words, it is reasonable to assume, as this Court did in *DeVeau*, that Congress knew of Parts II

and III of the Waterfront Act when it approved Part I. If Congress had been concerned that the implementation of Parts II and III would be contrary to Congressional intent—that is, if it thought the NLRA and LMRDA had pre-empted this sort of legislation—it could have refused its approval and would almost certainly have noted its doubts. Congress' approval of the compact thus stands as a theoretical, generic and *advisory* statement on pre-emption. Congress' approval cannot stand, however, as a statement that it could approve specific state legislation which technically neither was nor should have been under its consideration.

Under the doctrine of judicial restraint, the *DeVeau* Court correctly limited its decision to the facts before it. The Court was not faced with interpreting Congress' approval of the Waterfront Act except in the context of deciding whether the specific Act was pre-empted. In the context of the present case, however, a more exact reading of the same Congressional approval must be developed. Congress there indicated a belief that this sort of narrowly-drawn legislation was not pre-empted by federal legislation, not that it should adjudicate pre-emption on a case-by-case basis.

Even if Congress *had* specifically authorized the Waterfront Act, it has not had and will never have an opportunity to authorize the instant legislation. One would then have to decide whether Congress, having approved a state law forbidding unions from collecting dues from longshoremen if the unions' officers were convicted felons, would disapprove the same state's law forbidding unions from collecting dues from gaming industry employees under the same circumstances. The jump from waterfront terminals to casino hotels, in terms of the problem involved—i.e., its attractiveness to organized crime, the likeli-

hood of labor abuse, and the actual history of attempted organized crime infiltration in the industry—is a very, very short one. The only substantial difference between this case and *DeVeau* is that in *DeVeau* New Jersey signed a cooperative compact with New York, whereas in this case it has not and could not.[12] It would be manifestly unjust to deprive New Jersey of the right to protect its citizens from organized crime in one case but not in another, where the only difference was the fortuitous and irrelevant existence of a compact with another state.

3. The Purpose and Scope of the State Legislation, and the Degree of Its Impact on the NLRA, Were Factors in the DeVeau Decision As Important As Congress' Approval of the Interstate Compact

The Third Circuit's finding that *DeVeau* was determined by a single factor—Congress' approval of the interstate compact—ignores the primary holding of the case. Congressional approval was an unusual circumstance and an important one to this Court's discussion, but it was certainly not the only factor taken into account, and arguably was not the most important factor.

The legal analysis in *DeVeau* begins, at 363 U.S. 151, with the words "[w]ith this background in mind." The Court first stated that the situation called for a weighing of federal and state interests, clearly based on the state's interest in the area and the holding that the Waterfront Commission Act did not, in truth, "deprive" the employees of their ability to choose a labor representative.

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12. No compact is possible because New York, like the other states abutting New Jersey, has not legalized casino gambling. If anything, the lack of an interstate compact shows that the problem here is more deeply rooted in local concerns than that in *DeVeau*, where the problem was an interstate one and thus more susceptible to federal regulation.

The Court then stated the crucial issue:

> The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in [the New York Act].

Id. at 153. The Court then answered its question:

> In light of the purpose, scope, and background of this New York legislation and Congress' relation to it, such an inference of incompatibility has no foundation. *Id.*

In other words, the Court had *two* grounds for its decision; one was the nature of the statute itself, and the other was the Congressional approval. Again, in distinguishing *Hill v. Florida*, the Court cited the same two factors: Congressional approval, and

> that the challenged state legislation was part of a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combating local crime infesting a particular industry.

Id. at 155.

There is much more to *DeVeau* than a rubber-stamp on a Congressionally-approved state statute. The Court *first* held that the impact of the state legislation was so minimal that a balancing of interests was appropriate; it *then* looked both to Congressional intent—including Congress' implied assent in approving the compact—and to the "purpose, scope and background" of the state legislation to determine that the legislation was not pre-empted.

This Court placed Congress' ratification of the *DeVeau* compact in the context of balancing state versus federal interests; it was not impelled to develop a balancing test because of the presence of the compact. In other words,

the need for a realistic accommodation of interests was present in spite of the compact; the compact approval was a subordinate question to be placed on the balancing scales. The Third Circuit's opinion thus cannot be defended on the theory that there is no need for a weighing of interests absent prior Congressional approval.

4. The Third Circuit Failed to Follow the Pre-emption Analysis Announced in DeVeau

The pre-emption test announced by the Third Circuit below is directly at odds with the test announced by this Court in *DeVeau*. The Circuit held as follows:

> We note at this point that there are in labor law two separate preemption doctrines. The first, covering protected activity, is absolute.
>
> > When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.
>
> On the other hand, where the activity in question is not specifically protected by section 7 but is nevertheless federally regulated, a case by case determination of the interaction between state and federal regulatory schemes is required. The *Hill v. Florida* rule, *and this case, fall in the first category.* Choice of a bargaining representative is totally protected by sec-

> tion 7, except to the extent that the bargaining representative may be disqualified under section 503(a) of the LMRDA. No section 504 LMRDA disqualification applies to this Union's officers. *Thus there is neither occasion nor justfication for engaging in weighing or balancing.*

709 F.2d at 828 (emphasis added; citations omitted).

The Circuit Court's analysis blatantly misconstrues this Court's holding concerning a nearly identical state statute. In *DeVeau*, this Court held that:

> This is not a situation where the operation of a state statute so obviously contradicts a federal enactment that it would preclude both from functioning together or, at least, would impede the effectiveness of the federal measure. Section 8 of the Waterfront Commission Act does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received 'good conduct' certificates. The fact that there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers. Obviously the National Labor Relations Act does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing.'

363 U.S. at 152.

The *DeVeau* Court then did exactly what the Third Circuit saw neither "occasion nor justification" to do, to wit: balancing the impact of the state legislation

on Section 7 rights against a "legitimate and compelling" state interest in "combating local crime in a particular industry."

The Circuit's failure to apply the proper test to these facts constitutes, in and of itself, grounds for reversal and remand.

POINT FOUR

NLRB PROCEDURES ARE INADEQUATE TO SAFEGUARD THE CITIZENS' INTERESTS

The underlying premise of this litigation is the inadequacy of NLRB procedures to prevent criminal infiltration in an industry that, like the gaming industry, is highly attractive to organized crime. This inadequacy has often been recognized. Congress has recognized it at least three times: in passing the LMRDA, in approving the compact in the New York Waterfront Commission case and in enacting RICO. New Jersey has recognized it in passing the Casino Control Act. And this Court recognized it in *DeVeau v. Braisted, supra.* In some situations, NLRB procedures may be worse than inadequate; they may be, as a practical matter, non-existent.

The reality of the current situation in Atlantic City is that, without the New Jersey Casino Control Act, the state has no satisfactory way to prevent criminal syndicates from gaining a foothold in the gaming industry through infiltration of labor unions. The NLRB simply will not review the type of activity regulated by the Casino Control Act.

The NLRB can refuse to certify a labor union if someone can prove, to the Board's satisfaction, that the union is so corrupt that it is not really a "labor organization"—that is, if a union is a profit-making enterprise for its officers to a degree that it would not adequately repre-

sent its members' interests. This procedure is generally inadequate for at least two reasons.

First, there is no satisfactory way for the state to attack a labor organization before the Board. Appellee Local 54's representation of employees in the gaming industry in Atlantic City has to date, in every instance, resulted from voluntary recognition. Local 54 has never been certified by the Board as the exclusive bargaining representative of any employee in any Atlantic City casino hotel. (The Third Circuit's constant reference to Local 54 as the "certified" bargaining representative of the employees in question—*e.g.*, 709 F.2d at 817, 825, 830, 831 and 832—is incorrect.) Thus no opportunity presently exists for the Board to revoke certification, since none exists.

Moreover, the "new hotel" clause in the recently negotiated agreement between Local 54 and each of the current Atlantic City casino hotels raises the possibility that Local 54 may never have to go through the Board's Section 9 petition, election and certification procedures to represent employees of the Atlantic City gaming industry. The "new hotel" clause requires the hotel casinos to recognize this union when presented with appropriate evidence of majority status without invoking the type of formal procedures where the status of a labor organization could be examined.

This Court has previously recognized that the ability of an interested person to find a satisfactory forum to protect its interests may provide strong impetus to abridge even the primary jurisdiction of the NLRB. In *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), this Court held that the primary-jurisdiction rationale

> does not extend to cases in which an employer has no acceptable method of invoking, or inducing the union to invoke, the jurisdiction of the Board.

Id. at 202.

More importantly, however, even if the state could invoke a Section 2(5) certification hearing, which it cannot, there are critical differences between the issues that the Board would consider and the problems that the state must resolve. Because of the insidious and persistent nature of mob infiltration, the state believes it cannot safely allow convicted felons and associates of known career criminals to control certain labor unions. It is interested in one and only one issue: Are a labor organization's officers so tied to organized crime that their control of a labor organization creates an unsatisfactory risk of mob control?

The Board, on the other hand, is interested in an entirely different question: Does the union seek to represent employees? It is entirely conceivable that a corrupt union owned and run by a Cosa Nostra family could pass the Board's test. As the Board itself has stated,

> In order to be a labor organization under Section 2(5) of the Act, two things are required: first, it must be an organization in which employees participate; and second, it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment. If an organization fulfills these two requirements, the fact that it is an ineffectual representative, that its contract does not secure the same gains that other employees in the area enjoy, that *certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused*, cannot affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.

Alto Plastics, 136 N.L.R.B. 850, 851-52 (1962) (emphasis added).

Sears, Roebuck, supra, considered this problem of Board inquiries being substantively inadequate to protect other legitimate interests, and held that

> [t]he critical inquiry . . . is . . . whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board. . . .
>
> In the present case, the controversy which Sears might have presented to the Labor Board is not the same as the controversy presented to the state court.

436 U.S. at 197-98.

The overlap between the Casino Control Act and the NLRA is extremely small, a fact which is important in two ways. A legitimate state interest is not protected by the NLRA; and the impact on the Board's processes is minor. The reasons for pre-empting the state statute are less important than the reasons for allowing it to operate, and this Court should allow the Casino Control Act to stand.

POINT FIVE

THE PENSION AND WELFARE FUND SANCTION HAS NEVER BEEN USED AND CONSIDERATION OF ITS PRE-EMPTION BY ERISA IS PREMATURE

Section 93(b)'s prohibition against a labor organization's administration of "any pension or welfare funds, if any officer . . . is disqualified in accordance with . . . Section 86 of [the] Act" might be pre-empted by ERISA if it were applied by the state to ERISA-covered benefit plans. However, this specific provision of the state statute

has *not* been applied or enforced. In *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945), the Court noted that states,

> when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them.

Id. at 470. The Court, therefore, held:

> In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow.

Id. at 470-471.

There are pension and welfare funds that are not subject to ERISA, and the state courts might well construe the statute to apply only to such non-ERISA funds. If so, they would certainly not be subject to federal preemption.

It is simply too soon for the federal courts to adjudicate this part of the New Jersey Casino Control Act, both in terms of ripeness and in terms of a live case or controversy. The lower court's decision is premature and should be reversed.

CONCLUSION

For all of the reasons set forth above, the Third Circuit erred in holding that New Jersey's application of the provisions of its Casino Control Act to the Appellees violated the doctrine of federal labor law pre-emption. The Third Circuit's decision, to the extent it is based on faulty pre-emption analysis, should be vacated, and an opinion should be entered by this Court upholding the New Jersey statute as applied in this case against attack on federal labor law pre-emption grounds.

Respectfully submitted,

WILLIAM F. KASPERS
(Counsel of Record)
R. MASON BARGE
3500 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9200

Counsel for Amici Curiae Atlantic City Casino Hotel Association and Playboy Hotel Casino

PROOF OF SERVICE

It is hereby certified that three (3) copies of the foregoing MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF ATLANTIC CITY CASINO HOTEL ASSOCIATION AND PLAYBOY HOTEL CASINO AS AMICI CURIAE IN SUPPORT OF APPELLANTS have been served this 11th day of January, 1984, by United States mail, postage prepaid, upon the following counsel of record:

Robert J. Genatt, Esq.
3131 Princeton Pike Office Park
Building No. 5 CN 208
Trenton, New Jersey 08625

Anthony Parrillo, Esq.
Richard J. Hughes Justice Complex CN 047
Trenton, New Jersey 08625

Bernard N. Katz, Esq.
1200 Lewis Tower Building
No. 5
15th and Locust Streets
Philadelphia, Pennsylvania 19102

WILLIAM F. KASPERS
Attorney for Amici Curiae Atlantic City Casino Hotel Association and Playboy Hotel Casino